INTERFOOD SDN BHD

v.

ARTHUR ANDERSEN & CO & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL SUIT NO: MT3-22-137 OF 1999]
23 SEPTEMBER 1999

CIVIL PROCEDURE: *Discovery - Order for oral evidence - Setting aside - Application for order made by way of summons-in-chambers in reliance on Norwich Pharmacal principle - Whether proper - Purpose of order - Whether for any committal proceeding - Whether only to identify persons implicated in alleged doctoring of evidence - Failure to comply with O. 39 Rules of the High Court 1980 - Whether irrelevant*

The plaintiff, who alleged that the first defendant had tampered with certain audit working papers that it had obtained under an Anton Pillar order, applied for and obtained an *ex parte* order allowing it to take oral evidence from certain individuals ('order for oral evidence'). The first defendant and two others alleged that the plaintiff (i) was only seeking to compel the witnesses to give oral evidence for the purposes of committal proceedings; (ii) had not complied with O. 39 Rules of the High Court 1980 ('the RHC') when applying for the order for oral evidence; and in the circumstances, applied to set aside the order. The plaintiff argued that it was throughout relying on the *Norwich Pharmacal* principle, and not on O. 39 r. 1 of the RHC, and a question hence arose as to whether, in obtaining the order for oral evidence, the plaintiff has complied with the procedure enunciated in the *Norwich Pharmacal* principle.

Held:

[1] The evidence sought to be adduced by the plaintiff pursuant to the order for oral evidence was not for the purposes of the committal proceedings but rather with a view to discrediting or attacking the contents of the audit working files, by way of a process discovery in order to identify the partner or partners of the first defendant for any act of alleged tampering. The oral evidence could not add to any grounds to the committal proceedings because these grounds must first be contained in the statement under O. 52 r. 2(2) RHC.

[2] The plaintiff's summons-in-chambers is consistent with the application of the *Norwich Pharmacal* principle. The procedure approved by the Court of Appeal in *Lee Lim Huat's* case, when applying the *Norwich Pharmacal* principle, is clearly by the summons-in-chambers and made *ex parte* without notice to the appellant in that case. The plaintiff was therefore correct in adopting the procedure herein. The first defendant is of course entitled to cross-examine the witnesses.

[3] The plaintiff was entitled to the process of discovery in order to identify which partner of the first defendant was implicated in the alleged doctoring of the working files and papers. These are questions that may only be answered by adducing evidence pursuant to the order for oral evidence.

[4] Since O. 39 r. 1 has not been relied upon by the plaintiff who has instead correctly followed and complied with the procedure as approved by the Court of Appeal in *Lee Lim Huat's* case, O. 39 has no application here. In the circumstances, all the submissions of the defendants were irrelevant to the order for oral evidence.

[Application dismissed.]

Case(s) referred to:

Cheow Chew Koon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(refd)***

Lee Lim Huat v. Yusuf Khan Ghows & Anor [1997] 3 CLJ 197 ***(foll)***

Norwich Parmacal Co & Ors v. Customs and Excise Commissioners [1974] AC 133 ***(refd)***

Sunkyong International Inc v. Malaysia Rubber Development Corporation Bhd [1992] 3 CLJ 1531 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 29 r. 1(2), (2A), O. 39 r. 1, O. 52 rr. 2(2), 5(3)

For the plaintiff - Gideon Tan (Mohd Zaini with him); M/s Gideon Tan Razali Zaini

For the 1st defendent - Cecil Abraham (Gurmeet Kaur with him); M/s Shearn Delamore & Co

For Pang Seng John & Pang Yan Boon - Effendi Othman; M/s Zaid Ibrahim & Co

For the other defendents - Zaki Azmi (Robert Lau with him); M/s Lee & Tan Assoc

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Application

This application in encl 62 by the first defendant and two other deponents Pang Shen John and Pang Yan Boon ('the first defendant and two others') seeks to set aside the *ex parte* order which I made on 8 June 1999 in encl 42, allowing oral evidence to be taken from three individuals, *viz* Pang Shen John, Pang Yan Boon and Lee Chong Hui ('the order for oral evidence') in respect of the alleged wrongdoings of the first defendant in altering, tampering or doctoring the audit working papers obtained by the plaintiff pursuant to an Anton Pillar order dated 9 March 1999 ('the Anton Pillar order').

Submissions And Decision

Respective learned counsel for the first defendant and two others raise substantially similar issues in their respective submissions. Hence, it is necessary to consider these issues together for the purpose of arriving at my decision. The issues are particularised under the following heads:

Plaintiff's Attempt To Compel Witnesses For Purposes Of Committal Proceedings

It was submitted for the first defendant and two others that the plaintiff is attempting to compel witnesses to give oral evidence for the purposes of committal proceedings.

The contention for the plaintiff is that the oral evidence when adduced would not be used in the committal proceedings which would be dealt with independently.

From the submissions, it is my view that there is not the slightest doubt that the evidence sought to be adduced by the plaintiff pursuant to the order for oral evidence is not for the purposes of the committal proceedings but rather with a view to discrediting or attacking the content of the audit working files, by way of the process of discovery in order to identify the partner or partners of the first defendant for any alleged act of tampering. The oral evidence cannot add to any grounds to the committal proceedings because these grounds must first be contained in the statement under O. 52 r. 2(2) of the Rules of the High Court 1980 ('RHC'). Further, O. 52 r. 5(3) provides that no grounds shall be relied upon except the grounds set out in the statement under O. 52 r. 2(2), unless the court hearing an application for an order of committal grants leave. That is a separate proceeding.

The order for oral evidence was granted by me on principle established in *Norwich Parmacal Co & Ors v. Customs and Excise Commissioners* [1974] AC 133 (HL) ('the *Norwich Pharmacal* principle'). This is the process of discovery against third parties and the procedure was approved by the Court of Appeal in *Lee Lim Huat v. Yusuf Khan bin Ghows & Anor* [1997] 3 CLJ 197; [1997] 2 MLJ 472.

Briefly, *Lee Lim Huat's* case involved a dispute in a law firm wherein the appellant Mr Lee Lim Huat parted company with the respondents. The respondents later complained that the appellant continued to interfere with the affairs of the new law firm. The respondents applied for and obtained an interlocutory injunction restraining the appellant from acting in a manner detrimental to the partnership. Subsequently, a client of the partnership who was once attended by the appellant, wrote to the respondents stating that 'after due consultation with the person in charge' the amount owing to the respondents have been reduced to only RM58,000. The respondents obtained an order for oral examination to be taken from the client, the third party, and the oral evidence was conducted in the absence of the appellant.

In *Lee Lim Huat's* case, the appellant complained about the way the respondents obtained evidence from the third party. The appellant argued that the procedure adopted by the respondents were non existent and that notice of the summons for oral evidence should have been given to the appellant. The Court of Appeal rejected the appellant's arguments, adopted and approved the *Norwich Pharmacal* principle, which has been stated by Lord Reid at p. 175 as follows:

> ... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoings, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense, the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its preparation.

The plaintiffs summons in chambers in encl 28 is consistent with the application of the *Norwich Pharmacal* principle.

The procedure approved by the Court of Appeal in *Lee Lim Huat's* case, when applying the *Norwich Pharmacal* principle is, quite clearly, by summons-in-chamber and made *ex parte* without notice to the appellant in that case.

From the decision of the Court of Appeal in *Lee Lim Huat's* case, I hold that the plaintiff is correct in adopting the procedure herein. The first defendant is of course entitled to cross-examine the witnesses.

Plaintiff's Failure To Comply With O. 39

Another issue raised by the first defendant and two others is that the plaintiff has failed to comply with O. 39 of the Rules of the High Court 1980 when the plaintiff applied for the order for oral evidence.

The plaintiff's counsel submitted that the plaintiff was not relying on O. 39, but on the *Norwich Pharmacal* principle as alluded to above.

For a better perception of O. 39, it is necessary for me to refer to O. 39 r. 1 which is reproduced below:

> (1) The Court may, in any course or matter where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.
>
> (2) An order under para (1) may be made on such terms (including, in particular, terms as to giving of discovery before the examination takes place) as the Court thinks fit.

Since the plaintiff is not relying on O. 39 r. 1, the issue for determination is whether in obtaining the order for oral evidence, the plaintiff has complied with the procedure as enunciated in *Norwich Pharmacal* principle which has been approved by the Court of Appeal in *Lee Lim Huat's* case.

The plaintiff's statement of claim is founded upon a cause of action arising out of both contract and professional negligence in preparing the audit of the plaintiff. At the heart of this question is the first defendant's audit working files which would show the standard of work provided by the first defendant during the audit of the plaintiff. If these audit working files have been doctored as alleged, for the purposes of avoiding liability, this would inevitably affect the determination of the suit herein. The plaintiff is therefore entitled to the process of discovery in order to identify which partner of the first defendant was implicated in the alleged doctoring of the working files and papers. These are the questions that may only be answered by adducing evidence pursuant to the order for oral evidence.

Plaintiff's *Ex parte* Application To Obtain The Order For Oral Evidence Is Wrong

It was contended for the first defendant and two others that the plaintiff's application to obtain the order for oral evidence should not have been made *ex parte* but should instead invoke O. 39 r. 1 above.

The plaintiff's response is that the plaintiff's *ex parte* application above is perfectly within the procedure in *Norwich Pharmacal* principle which was approved by the Court of Appeal in *Lee Lim Huat's* case.

In my judgment, since O. 39 r. 1 has not been relied upon by the plaintiff who has instead correctly followed and complied with the procedure as approved by the Court of Appeal in *Lee Lim Huat's* case, O. 39 has no application here.

Further, learned counsel for the first defendant and two others submitted to the effect that O. 29 r. 1(2) and (2A) of the Rules of the High Court 1980 should apply. In my view, O. 29 has no application as it refers specifically to injunctions. The plaintiff's application was plainly and obviously for an order for oral evidence. In the circumstances, all the submissions advanced for the first defendant and two others are completely irrelevant to the order for oral evidence obtained pursuant to the *Norwich Pharmacal* principle.

Defects In The Plaintiff's Intitulement

Learned counsel for the first defendant complained that the plaintiff's intitulement in the application in encl 28 for order for oral evidence is defective and relied on *Cheow Chew Koon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 MLJ 457.

In response, it was submitted for the plaintiff that the case relied upon by the first defendant and two others related to an originating summons whereas the plaintiff's application was by way of a summons in chambers.

In my view, the submission for the first defendant and two others is devoid of merits. The authority relied upon concerns an originating summons and not a summons-in-chambers.

Further, the Supreme Court in *Sunkyong International Inc v. Malaysia Rubber Development Corporation Bhd* [1992] 3 CLJ 1531; [1992] 2 MLJ 146, *inter alia*, held that 'while it was far better to quote section and verse or specific order or rule in any application, it was never fatal to any application to omit to do so where the applicant can bring himself within any relevant specific order or rule'.

Conclusion

The application by the first defendant and two others in encl 62 cannot be sustained and is hereby dismissed with costs.

In line with the procedure and practice approved by the Court of Appeal in *Lee Lim Huat's* case, the first defendant is given liberty to cross-examine the witnesses which are to be called by the plaintiff pursuant to the order for oral evidence.